

In the Court of Appeals of the State of Alaska

David Haeg,

Appellant,

v.

State of Alaska,

Appellee.

Court of Appeals No. **A-13501**

Order

Date of Order: **2/20/2020**

Trial Court Case Nos. **3KN-10-01295CI, 4MC-04-00024CR**

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges

In *Haeg v. State*, this Court reversed the superior court’s summary dismissal of Haeg’s application for post-conviction relief and remanded Haeg’s case to the superior court for further proceedings on various discrete issues.¹ On remand, the case was assigned to Superior Court Judge William A. Morse, the Presiding Judge of the Third Circuit.

One of the issues to be determined on remand was whether Haeg’s trial attorney — Arthur “Chuck” Robinson — was ineffective. During the remand proceedings, Judge Morse disclosed that he had been professionally acquainted with Robinson for 36 years. Based on this disclosure, Haeg moved to disqualify Judge Morse for cause under AS 22.20.020(a)(9). Alaska Statute 22.20.020(a)(9) requires judges to disqualify themselves if they “feel that, for any reason, a fair and impartial decision cannot be given.” Alaska Statute 22.20.020(c) further provides, in pertinent part, that “[i]f a judicial officer denies disqualification[,], the question shall be heard and

¹ *Haeg v. State*, No. A-11349, 2016 WL 7422687, at *2 (Alaska App. Dec. 21, 2016) (unpublished).

determined by another judge assigned for the purpose by the presiding judge of the next higher level of courts or, if none, by the other members of the supreme court. The hearing may be ex parte and without notice to the parties or judge.”

In the current case, Judge Morse summarily denied Haeg’s motion to disqualify on the record.² But no further proceedings occurred. That is, no other judge reviewed Judge Morse’s decision.

Now on appeal, Haeg asserts that this is error that invalidates Judge Morse’s subsequent findings in Haeg’s case. The State argues that Haeg has waived this claim by failing to request that another judge review Judge Morse’s denial of his motion to disqualify.

There is some support for the State’s position. In the 1978 decision *Coffey v. State*, the Alaska Supreme Court ruled that under AS 22.20.020(c), “it was incumbent on Coffey to request the chief justice, as presiding judge of the next higher court, to appoint another judge to determine the question.”³ In other words, notwithstanding the plain language of AS 22.20.020(c), a litigant who unsuccessfully moves to disqualify a judge for cause bears the burden of requesting review by another judge. Failure to request such a review waives this issue for appellate purposes.⁴ *Coffey* has been cited for

² Judge Morse’s disclosure of his prior professional association with Robinson, Haeg’s motion to disqualify Judge Morse, and Judge Morse’s denial of the motion occurred on January 28, 2019, shortly before Robinson was called as a witness. *See* Volume I, Transcript of Proceedings at pp. 169-173.

³ *Coffey v. State*, 585 P.2d 514, 525 (Alaska 1978).

⁴ *Id.*

this proposition in subsequent appellate cases.⁵

In a more recent unpublished case, however, the Alaska Supreme Court suggested that the *Coffey* preservation rule would be unfair if applied to a *pro se* litigant who has no notice that they must request this independent review. In *Kurka v. Kurka*, the supreme court noted that “[a]s a pro se litigant, Walter arguably should have been informed that he needed to request review by another judge in order to preserve the issue.”⁶ The court further noted that “the record does not disclose whether Judge Brown gave Walter this information.”⁷ However, the court declined to reach the question of whether the *Coffey* preservation rule applied in *pro se* circumstances because the issue was moot. (The issue was moot because the litigant in *Kurka* had filed a second motion

⁵ See, e.g., *Kingery v. Barrett*, 249 P.3d 275, 286 n.44 (Alaska 2011) (“But it was incumbent on Kingery, as the party seeking disqualification, to request that the chief justice assign the matter to a different judge after the superior court denied his motion.”) (citing *Coffey*, 585 P.2d at 525); *K.F. v. S.G.*, Nos. S-11901 & S-11971, 2007 WL 1302414, at *4 (Alaska May 2, 2007) (unpublished) (“If K.F. wanted independent review of the master’s refusal to recuse herself, it was incumbent on K.F., under AS 22.20.020(c), to request that the presiding judge of the next higher court appoint another judge to reexamine her recusal request.”) (citing *Coffey*, 585 P.2d at 525); *Wilson v. State*, No. A-2630, 1989 WL 1595108, at *6 (Alaska App. Aug. 2, 1989) (unpublished) (“Wilson did not seek appointment of another judge to determine the question of Zimmerman’s bias against him[; t]herefore, he waived the right to an independent review of his motion.”) (citing *Coffey*, 585 P.2d at 525); *Jerrel v. State*, No. A-5191, 1995 WL 17221241, at *1 (Alaska App. Aug. 9, 1995) (unpublished) (“[B]ecause Jerrel did not request that the issue of disqualification be heard and determined by another judge in accordance with AS 22.20.020(c) after Judge Cranston denied disqualification, Jerrel has failed to preserve the issue.”) (citing *Coffey*, 585 P.2d at 525).

⁶ *Kurka v. Kurka*, No. S-12143, 2007 WL 1723468, at *6 (Alaska June 13, 2007) (unpublished).

⁷ *Id.*

to disqualify the judge on the same grounds and the judge’s denial of that second motion *had been* reviewed by a second judge as contemplated by the statute).⁸

We agree with the supreme court’s reasoning in *Kurka*. The *Coffey* preservation rule is at odds with the plain language of the statute.⁹ Moreover, there are multiple decisions from the Alaska Supreme Court and this Court — including our own unpublished decision in Haeg’s prior appeal — that do not mention *Coffey* and that could be read as suggesting that the denial of a motion to disqualify is automatically subject to independent review by another judge.¹⁰

Thus, given the lack of clarity in the appellate case law and Haeg’s *pro se* status, we conclude that Haeg’s failure to request review of Judge Morse’s denial of disqualification should be excused and an opportunity for this review should occur. We also conclude that the appropriate remedy is to allow this review to take place before we address the remainder of Haeg’s claims on appeal.

Accordingly, we remand this case to the superior court for review of Judge Morse’s denial of Haeg’s motion to disqualify under AS 22.20.020(c). This review shall

⁸ *Id.*

⁹ See *Beshaw v. State*, Nos. A-11657 & A-11658, 2017 WL 5998765, at *6-7 (Alaska App. Nov. 29, 2017) (Mannheimer, J., concurring) (suggesting that the *Coffey* preservation rule is “a bad interpretation of the statute” and urging the Alaska Supreme Court to change this interpretation).

¹⁰ See, e.g., *Saofaga v. State*, 435 P.3d 993, 997 n. 11 (Alaska App. 2018); *Haeg*, 2016 WL 7422687 at *5 n. 25 (“Under Alaska law, when a judge denies a motion to recuse, the judge’s decision is automatically subject to immediate review by the next highest court.”) (citing AS 22.20.020(c)); see also *Johnson v. Johnson*, 394 P.3d 598, 604 n.23 (Alaska 2017).

be conducted by a superior court judge appointed by the Chief Judge of this Court in accordance with the established rotation of superior court judges appointed for this purpose. This review shall be conducted on an expedited basis.

Clerk of the Appellate Courts

Meredith Montgomery

cc: Court of Appeals Judges
Trial Court Judge
Central Staff
Administrative Director

Distribution:

Mail:

Soderstrom, Donald

Haeg, David

